Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

SHELDON SCHACHNER,

Petitioner,

- v -

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether there is a violation of substantive due process of law when a State criminally prosecutes and convicts a person for failing to test and remove hazardous waste which has belonged to and been disposed of by a third party without proof that the defendant can financially carry out the task.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 6

CONCLUSION 8

APPENDIX

Transcript of Proceedings 9/22/97 ..... 1a

Judgment Entry of 10/8/97, Lucas County Court of Common Pleas 4a

Opinion and Judgment Entry of 1/29/99, Lucas County Court of Appeals 6a

Entry of 5/26/99, The Supreme Court of Ohio 21a

TABLE OF AUTHORITIES

Cases

Reno v. Flores, 507 U.S. 292 (1993) 7

U.S. v. Salerno, 481 U.S. 739 (1987) 7

Statutes

28 U.S.C. §2104 1

Other Authorities

Constitution of the United States 2, 8

OPINIONS BELOW

The citations of the opinions entered in this case are as follows:

Judgment entered October 8, 1997 in Case No. CR97-1366

Opinion Judgment Entry of January 29, 1999 in the Court of Appeals of Lucas County, No. L-97-1388

Entry denying leave to appeal in Case No. 99-477 in the Ohio Supreme Court entered May 26, 1999.

JURISDICTION

The Order for which a writ of certiorari is sought was entered by the Ohio Supreme Court on May 26, 1999. The provisions of 28 U.S.C. §2104 confirm jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V .....App. at 22a

U.S. CONST. amend. XIV .....App. at 22a

STATEMENT OF THE CASE

In 1994, petitioner Dr. Sheldon Schachner owned a warehouse in Toledo, Ohio. In October of that year, representatives of the Ohio Environmental Protection Agency met with Dr. Schachner to discuss drums of hazardous waste which had been found on his property adjacent to the warehouse building.

Petitioner had first noticed the drums after a former tenant had abandoned a lease at the property several years earlier. The tenant had operated a business painting doors. The drums had been dumped in a grassy area outside the warehouse but still on property owned by petitioner.

Nineteen steel drums had been found, one containing a liquid and the rest a power-like solid, as well as 15 buckets containing liquid. The Ohio EPA sampled the containers and found all but one to contain non-hazardous solid waste. The remaining drum had hazardous waste, that being a liquid which had a flash point sufficiently low to place it in the hazardous category. There was no injury to third parties.

The Director of the Ohio EPA ordered petitioner to accomplish certain testing of the barrels and to remove the waste. Petitioner told the Ohio EPA that the drums were not his and that he would not be doing any testing or removal. He explained that the drums had been placed there by his former tenant who should be responsible for removing them. Despite knowing where the tenant was, the Ohio EPA determined to bring criminal charges against petitioner.

On February 29th, petitioner was indicated on five felony counts. In particular he was charged with the following unlawful acts:

1. The illegal disposal of hazardous waste.

2. The failure to comply with an order issued by the Director of the Ohio Environmental Protection Agency.

3. The illegal disposal of solid waste.

4. The illegal transportation of hazardous waste.

5. The illegal storage of hazardous waste.

On September 22, 1997, a trial commenced in the Lucas County Court of Common Pleas. The following day, the jury returned its verdict of not guilty on Counts 1, 3 and 4 and guilty on Counts 2 and 5. On October 8, 1997, judgment was entered. Petitioner was sentenced to two years in the Ohio correctional system on each count, which sentences were suspended and the defendant placed on probation on each count for a period of three years and fined $25,000. The sentences were to be served concurrently.

A timely notice of appeal was filed on October 24, 1997. The Court of Appeals denied relief in its order of January 29, 1999. A timely appeal was taken to the Ohio Supreme Court but on May 26, 1999, leave to appeal was denied.

The question presented for review here was raised at the close of the State's case through a Motion to Dismiss.

After it was denied, petitioner presented no evidence. The issue was raised again before the Court of Appeals and in the Ohio Supreme Court.

ARGUMENT

It is beyond dispute that the State of Ohio has a compelling interest in assuring that the environment is free from hazardous waste. It is equally clear that the petitioner has compelling interest in not having his freedom restrained in a manner that violates his right to substantive due process of law. Petitioner asserts that that has occurred in this case.

On the record before this Court, there is no question that petitioner was not involved in the depositing of the materials on the ground outside his warehouse. It is equally clear that such materials were not his but they were the property of a third party.

It is also important to remember that this is not an action brought to appeal a contempt citation or one seeking a civil judgment. This is an action brought under circumstances in which the petitioner may yet find himself in prison. And he could be imprisoned even though there is no proof at all that he was able to accomplish the tasks required of him.

There can be no speculation about the petitioner's financial circumstances. The trier of fact cannot guess or surmise in criminal cases. The burden is upon the State to prove all relevant matters and to prove them beyond a reasonable doubt.

Consider the following scenario. A farmer in a rural Ohio county hires a crop duster to spray his crops. Without approval of the farmer, the crop duster dumps his pesticide into a creek on the farmer's property. The Ohio Environmental Protection Agency learns of the spill and directs the farmer to accomplish remediation. The cost is

several million dollars. The farmer is unable to bear the cost and the Director of the Ohio EPA determines to proceed criminally to set an example for all farmers in Ohio.

Petitioner submits that it is a violation of the farmer's substantive rights to due process of law that he should be subjected to criminal liability for failure to clean up someone else's mess without proof that he can financially do so. Such actions take one back to the debtor's prisons which were eliminated long ago and should not be renewed even in an effort to protect the environment.

The potential incarceration of an individual triggers heightened substantive due process scrutiny and there must be the most compelling of governmental interests to justify such proceedings. See *Reno v. Flores*, 507 U.S. 292 (1993). Generally there must be a punitive interest in imprisoning the convicted criminal. See *U.S. v. Salerno*, 481 U.S. 739 (1987).

Putting the petitioner behind bars, which is the risk he faced and continues to face will accomplish little. Whatever punitive interest the State might have could be as well served through civil proceedings which could carry consequences of a very serious nature but which would not be criminal.

The offending drums are the property of another. If criminal sanctions are needed, his is the case in which they should be sought. It was the tenant who dumped them, not petitioner.

CONCLUSION

Petitioner prays this Court to grant a Writ of Certiorari to review the proceedings below and to find that his right to substantive due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution have been violated.

Respectfully submitted,

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No. CR97-1366

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

STATE OF OHIO, Plaintiff v. SHELDON SCHACHNER, Defendant.

Judge Bruce E. Huffman

VOLUME II OF II - JURY INSTRUCTIONS

- - - - -

TRANSCRIPT OF PROCEEDINGS, pgs. 182-184

BE IT REMEMBERED, that on the trial of the above-entitled case, in the Court of Common of Lucas County, Ohio, in the September, 1997 Term of said Court, commencing on September 22, 1997, before the Honorable Bruce E. Huffman, a Visiting Judge sitting by assignment, the following proceedings were had, to-wit:

APPEARANCES:

BETTY D. MONTGOMERY, Attorney General
By: ROBERT J. COCHRAN, Assistant
& BRAD L. TAMMARO, Assistant,
On Behalf of the Plaintiff;

RICHARD M. KERGER, Esquire,
On Behalf of the Defendant.

- - - - -

(THEREUPON, the following proceedings were held in chambers at nine o'clock a.m.)

THE COURT: Let the record show we are in chambers and the defense has a motion. Go ahead and make your silly motion.

MR.KERGER: Pursuant to Rule 29, I would request to dismiss Counts Two and Four.

As to Count Two, I would say it is more for the record.

MR.COCHRAN: I am sorry. I don't have it. What is it?

MR. KERGER: Count Two is the failure to test. Count Four is the improper storage.

THE COURT: I see. Count Two is your Instruction No. 22, I think. Failing to comply with an order of a Director of the Environmental Protection Agency, yeah.

MR.KERGER: I believe that constitutes an unconstitutionally broad and improper delegation of authority to the director of the E.P.A. to make criminal whatever he or she chooses.

They issue an order, and on a failure to comply, for whatever reason, the person becomes subject to being convicted of an unclassified felony. The offense is you either comply or not comply. I think that violates the Ohio and United States Constitutions.

THE COURT: I had a problem with that, and talked it over with a couple of judges here including Judge Doneghy, whose case this is. But it is kind of analogous to

– one of them brought up kind of like in Municipal Court – Housing Court here someone has a porch that should be taken off or done or repaired, and if they order them to do it, and if they don't do it, it is a crime. It is thin, but I am going to overrule it.

MR. KERGER: Count Four, Your Honor, that I am more serious about and that deals with the issue of storage. It is the contention of the State and that these goods were stored , and the statute they rely on 3734.01, subsection (M) talks about the temporary storage – about goods on their way to an ultimate destination.

Now, I don't think it is propounded under the E.P.A. laws to dump it outdoors and leave it on the grass, but that's not storage. That is improper. It was not stored. It was abandoned by Mr. Muller, and it was left there. And I think under the language of the statute, that it does not make his conduct criminal.

MR. COCHRAN: Well, Your Honor, I would state that if you check the definitions, you won't find a definition of abandoned in the statute when – and you look at the definition of disposal,

Case No. G-4801-CR-0199701366

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO, Plaintiff v. SHELDON SCHACHNER, Defendant.

JUDGMENT ENTRY

Dated October 8, 1997. Court Reporter Lynette Shindorf ordered. State of Ohio: ROBERT COCHRAN. RICHARD M. KERGER present on behalf of the defendant. Defendant, SHELDON SCHACHNER present in court.

Judge Bruce C. Huffman

The defendant having been convicted at a Jury Trial of the offenses of Violating an Order of the Director of Environmental Protection to Obtain a Detailed Chemical and Physical Analysis of a Representative Sample of Wastes as charged in Count 2 in violation of Revised Code Section 3734.11 and 3734.99 and Recklessly Store Hazardous Waste as charged in Count 5 in violation of Revised Code Section 3734.02(F), 3734.11, and 3734.99 both being Unclassified Felonies.

After having considered the Presentence Investigation Report and having afforded Defendant and defense counsel their rights pursuant to Rule 32(A)(1), the Court orders that defendant be committed to the Ohio Department of Rehabilitation and Correction for a period of 2 years as to Count 2 and 2 years as to Count 5 until released according to law. A fine of $25,000.00 is imposed on both

counts. Said sentences are ordered served concurrent to each other. Total fine $25,000.00.

Imposition of incarceration portion of sentence ordered suspended. Defendant probated to the Lucas County Adult Probation Department for a period of 3 years conditional upon compliance with the rules and regulations of the department and with the special added conditions: 1) pay all court costs and 2) pay fine of $25,000.00.

Defendant advised of his rights to appeal. Defendant indicates that he intends to appeal. Stay on Execution of Sentence is granted. See J.E.

Defendant ordered to pay the costs of prosecution including any fees associated with the appointment of counsel. It is further ordered that the defendant pay any supervision fees associated with being granted probation. Payment of financial obligations shall be prioritized as restitution, supervision fees, court costs, fines, and assigned counsel fees.

/s/ Bruce C. Huffman
JUDGE BRUCE C. HUFFMAN

Court of Appeals No. L-97-1388,
Trial Court No. CR-97-1366

IN THE COURT OF APPEALS OF LUCAS COUNTY

STATE OF OHIO, Appellee v. SHELDON SCHACHNER, Appellant.

OPINION AND JUDGMENT ENTRY

January 29, 1999, Decided

COUNSEL: Betty D. Montgomery, attorney general, and Brad L. Tammaro and Robert J. Cochran, for Appellee.

Richard M. Kerger, for Appellant.

JUDGES: Before HANDWORK, SHERCK and KNEPPER

OPINION BY: KNEPPER

KNEPPER, J. This is an appeal from the judgment of the Lucas County Court of Common Pleas which, following a jury trial, found appellant, Sheldon J. Schachner, guilty of violating an order of the Director of Environmental Protection to obtain a detailed chemical and physical analysis of a representative sample of waste, in violation of R.C. 3734.11 and 3734.99, and recklessly storing hazardous waste, in violation of R.C. 3734.02(F), 3734.11, and 3734.99, both being unclassified felonies. Appellant's concurrent sentence of two years of incarceration on each count was suspended and he was fined a total of $25,000.

The trial court's judgment entry of sentencing was journalized October 8, 1997.

Appellant timely appealed his conviction and sentence and raised the following assignments of error:

> "Assignment of Error No. 1. When the State predicates criminal liability on an omission to accomplish an act, it is incumbent upon the State to prove beyond a reasonable doubt that the act was one which the defendant was capable of performing.
>
> "Assignment Of Error No. 2. Delegation to the Director of the Ohio Environmental Protection Agency of the right to issue orders, the violation of which becomes criminal, is unlawful and unconstitutional because of the absence of standards which those orders must follow.
>
> "Assignment of Error No. 3. The State cannot criminalize the failure to do a vain and unnecessary act.
>
> "Assignment of Error No. 4. The State cannot impose criminal liability upon the defendant for the failure to correct a condition created by others.
>
> "Assignment of Error No. 5. The Court failed to recognize in its instructions to the jury the difference between environmental waste which had been abandoned on the defendant's property as opposed to 'stored' on his property."

Appellant was indicted on February 24, 1997 regarding certain solid and hazardous waste located on his property at 2221 Lorle Street, Toledo, Ohio. Appellant was indicted on five counts: (1) knowingly attempting to dispose of hazardous waste, in violation of R.C. 2923.02, 3734.02(f), 3734.11, and 3734.99; (2) unlawfully and recklessly violating an order of the Director of Environmental Protection to obtain a detailed chemical and physical analysis of a representative sample of wastes that had been stored at 2221 Lorle Street, Toledo, Ohio, in violation of R.C. 3734.11 and 3734.99; (3) knowingly attempting to dispose of solid waste in a manner and/or location other than a sanitary landfill, in violation of R.C. 2923.02, 3734.11, and 3734.99, and O.A.C. 3745-27-05(A); (4) unlawfully and recklessly transporting or causing the transportation of hazardous waste to a premises other than those listed in R.C. 3734.02(F)(1) through (5), in violation of R.C. 3734.02(F), 3734.11, and 3734.99; and (5) recklessly storing hazardous waste at a premises other than those listed in R.C. 3734.02(F)(1) through (5), in violation of R.C. 3734.02(F), 3734.11, and 3734.99. The jury trial commenced on September 22, 1997.

Generally, the testimony at trial established that appellant had rented the property to Muller who had a painting business. Muller left the property in 1991 or 1992 owing approximately two months worth of rent, about $1,000 per month. Appellant discovered within a couple of months of Muller's departure that a number of fifty-five gallon drums were left on the property.

In 1994, the Ohio Environmental Protection Agency ("E.P.A.") discovered the barrels on appellant's property and had a representative sampling done. The E.P.A. determined that there were nineteen fifty-five gallon drums and a number of buckets or containers ranging up to five gallons in size. The E.P.A. found the barrels to be in fair to

poor condition with some of the barrels being tipped on their side and some being rusted shut. The barrels and buckets consisted of two types of material: a sandy type of material and a liquid material that had an odor of paint thinner to it. An analysis of the material established that the sandy material was not hazardous, as such, the E.P.A. considered it to be merely solid waste. The liquid material, however, have flash points between fifty-six and sixty-one degrees Fahrenheit. A flash point below one hundred forty degrees Fahrenheit is considered hazardous. As such, the E.P.A. concluded that the liquid material was hazardous waste.

In September 1995, Edward D'Amato of the E.P.A. informed appellant that, as the owner of the property, it was his responsibility to have the barrels tested and properly disposed of in a licensed facility. Although the barrels had been tested, further analysis was necessary in order to properly dispose of the materials. Any licensed disposal facility would have to know what the materials' characteristics were prior to disposing of them. Additionally, the E.P.A. was initially unable to open all of the barrels for testing.

A letter was sent to appellant in September 1994, stating that appellant had to properly test and dispose of the material and send the test results and the "manifest" associated with the disposal to the E.P.A. An additional letter was sent by the E.P.A. to appellant in October 1994, and a meeting was held at the property on October 14, 1994. But for one incident, appellant consistently asserted that the barrels were Muller's responsibility and that the E.P.A. should go after him.

Appellant also stated that he had no intention of disposing of the material.

In June 1995, appellant was notified by letter that the Director of Environmental Protection issued Final Findings and Orders regarding appellant's property. Appellant was informed that he could appeal to the Environmental Board of Review within thirty days after receiving notice of the director's action. The director found that several drums had been abandoned at the property and that characteristically ignitable hazardous waste was being stored there. The director ordered in pertinent part that appellant do the following: (1) obtain a detailed chemical and physical analysis of a representative sample of each of the wastes at the facility, within thirty days of the effective date of the orders; (2) submit to the E.P.A. the results of the waste analysis and a schedule for the removal of all identified hazardous waste at the facility, within forty-five days of the effective date of the orders; (3) remove all hazardous wastes (including all drum and containers) from the facility in accordance with Chapter 3734 of the Ohio Revised Code and the rules promulgated thereunder, within sixty-five days of the effective date of the orders, and comply with the manifesting, packaging, labeling, marking, and placarding requirements of O.A.C. 3745-52-20 through 3745-52-33; and (4) provide E.P.A. with documentation of compliance with the third order, within seventy-five days of the effective date of the orders. The director also made a number of orders regarding a Sampling and Analysis Plan ("SAP") for all the areas at the facility where hazardous wastes were illegally stored; however, a SAP is not at issue here.

In August 1995, seventeen of the nineteen fifty-five gallon drums were found in a broken down U-Haul truck. John Henley testified that he was hired by Claude Barnhill to assist in the removal of the barrels. Two of the barrels were left at the property because they were empty. The E.P.A. was called to deal with the U-Haul and the barrels because one of the drums was leaking a fluid that smelled of

paint thinner. D'Amato determined that the barrels were the same ones from the Lorle Street property because they bore the markings placed on them by the E.P.A. Further testing by the E.P.A. revealed that liquid material in one of the barrels had a flash point of seventy degrees Fahrenheit, i.e., it was hazardous. Ultimately, it cost the state $15,000 to dispose of the solid and hazardous material from the Lorle Street property.

Through testimony, it was established that appellant never tested the barrels, drums, or containers. Additionally, the Lorle Street facility was not authorized or licensed to store solid or hazardous waste. Finally, the persons who transported the barrels in the U-Haul were not licensed to transport or dispose of hazardous waste.

The jury found appellant guilty of counts two and five of the indictment and found him not guilty of count one, attempting to dispose of hazardous waste, count three, attempting to dispose of solid waste, and count four, transporting or causing the transportation of hazardous waste. It was from this conviction that appellant appeals.

In his first assignment of error, appellant argues that in order to sustain a conviction for failing to do a required act, the state must prove beyond a reasonable doubt that the act was one which appellant was capable of performing. The state responds that financial incapability is an affirmative defense which appellant must prove. In order for a person to be held criminally liable, both of the following must apply:

> "(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

> "(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense."

R.C. 2901.21(A).

R.C. 3734.11 states that "[n]o person shall violate any section of this chapter, any rule adopted under it, or any order issued under section 3734.13 of the Revised Code. R.C. 3734.13(A) states:

> "The director of environmental protection may issue, modify, suspend, or revoke enforcement orders in accordance with Chapter 3745. of the Revised Code *** directing the *** person to abate a violation, or to prevent any threatened violation, of any section of this chapter ***, [or] rule adopted thereunder, *** within a specified, reasonable time."

Whoever recklessly violates any section of R.C. Chapter 3734 is guilty of felony and shall be fined at least $10,000, but not more than $25,000, or imprisoned for at least two years, but not more than four years, or both. R.C. 3734.99(A).

Hence, with respect to appellant's failure to obtain a detailed chemical and physical analysis of a representative sample of waste, the state must demonstrate that appellant was capable of doing the act and that he recklessly failed to accomplish it.

Clearly, the material was capable of being treated, insofar as the EPA tested it. Appellant, however, contends

that the state had to prove beyond a reasonable doubt that he was financially capable of having the material tested.

Appellant has failed to cite any authority for his argument that financial ability must be demonstrated, and this court can find none.

Rather, we conclude that the state demonstrated that the act was capable of being performed, and if appellant was incapable of paying for the tests (which was not his position at trial), then that is an affirmative defense which he must prove. We liken this situation to that of a person who, charged with failing to exercise reasonable and ordinary control over his vehicle, claims that he was incapable of having control over the vehicle because he lost consciousness. In such a situation, a loss of consciousness operates as an excuse or justification for the conduct and, as such, constitutes an affirmative defense to criminal liability. See, e.g., State v. McCaw (Aug. 1, 1997), Montgomery App. No. 16202, unreported. Similarly, if appellant contends that he is incapable of performing an act that is generally capable of being performed, then the burden shifts to him to establish his affirmative defense. The state cannot require appellant to testify and appellant's financial state is a matter within his personal knowledge.

Accordingly, we find that appellant must establish his incapability of paying for the test as an affirmative defense. No evidence was offered regarding appellant's inability to perform the requested acts. As such, we find appellant's first assignment of error not well-taken.

In his second assignment of error, appellant argues that the Director of Environmental Protection had an unlawful and unconstitutional delegation of authority to issue orders because of the absence of statutory standards which those orders must follow. Citing State v. Switzer

(1970), 22 Ohio St. 2d 47, appellant argues that the legislature can delegate authority to an administrative agency "so long as sufficient standards are set up in the statute authorizing the delegation." Appellant asserts that R.C. Chapter 3734 provides no guidance for how the director may issue orders dealing with improper handling and storage of hazardous waste.

In addition to the consideration of the adequacy of statutory standards and guidelines, Switzer held that the legislature cannot delegate an agency power to make a law:

> "'As a general rule a law which confers discretion on an executive officer or board without establishing any standards for guidance is a delegation of legislative power and unconstitutional; but when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations.'" Switzer at 50, citing Matz v. J.L. Curtis Cartage Co. (1937), 132 Ohio St. 271, paragraph seven of the syllabus.

Although any agency cannot make law, it is permissible for the legislature to delegate power to the agency to determine the facts on which the law is to operate. The court noted:

> "'The penalty that is imposed for the violation of a law is a part of its very

> essence. Take away the penalty, or the sanction of the law, and it is no law.'" Switzer at 52, citing Gordon v. State (1889), 46 Ohio St. 607.

We find that R.C. Chapter 3734 provides adequate guidelines and standards which the director is to follow. R.C. 3734.13 grants the director the authority to issue orders "to abate a violation, or to prevent any threatened violation, of any section of this chapter other than sections 3734.90 to 3734.9013 of the Revised Code, a rule adopted thereunder, or a term or condition of a permit, license, or variance issued thereunder within a specified, reasonable time." O.A.C. 3745-65-13 and 3745-54-13 provide that before an owner or operator treats, stores, or disposes of any hazardous wastes, or nonhazardous wastes, he shall obtain a detailed chemical and physical analysis of a representative sample of the wastes. The director in this case issue an order requiring appellant to obtain such an analysis. R.C. 3734.11 states that no person shall violate an order issued under R.C. 3734.13. And, R.C. 3734.99 establishes the penalty that will be imposed for violating R.C. 3734.11 and, subsequently, an order issued under R.C. 3734.13.

The statute sets forth that the director is granted the authority to make orders to abate a violation, or to prevent any threatened violation, of any section of R.C. Chapter 3734 or a rule adopted thereunder, within a specified, reasonable time. R.C. 3734.13. As such, the director is limited in his authority to issuing orders relating only to violations of R.C. Chapter 3734, or any rule adopted thereunder.

Additionally, the director is not given the authority to make law; rather, the director is merely responsible for issuing orders regarding laws that are already established. As such, his authority is limited to executing and

administering the law. Such a grant of authority is constitutionally permissible.

Accordingly, we find that the legislative grant of authority to the director to issue orders is not unconstitutional or improper. Appellant's second assignment of error is therefore found not well-taken.

Appellant asserts in his third assignment of error that the state cannot hold him criminally liable for failing to do a vain and unnecessary act. Appellant asserts, "It was stipulated by the parties that the testing done previously by the Ohio Environmental Protection Agency, and which furnished a basis for the findings of fact made by the Director in his June 14, 1995 decision, 'produced representative samples of all waste ***.'" As such, appellant argues that the testing was done and, therefore, he should not be held liable for failing to have the waste analyzed. We disagree.

The stipulation referred to both tests, samples taken while the barrels were at the property and samples taken from the U-Haul. It was the combination of these two laboratory results that produced representative samples of all wastes. An analysis of all the waste was needed before proper disposal could be accomplished. The initial testing was insufficient because not all of the barrels were tested, as some were rusted shut.

Therefore, a "representative" sampling was not accomplished until the second test. The second test occurred after appellant had already failed to do the analysis himself. As such, appellant was not convicted of failing to do a vain act. Accordingly, his third assignment of error is found not well-taken.

In his fourth assignment of error, appellant argues that the state cannot impose criminal liability upon him for failing to correct a condition created by others. Appellant asserts that the prior tenant abandoned the barrels on the property. Appellant argues that to convict appellant for failing to remove the barrels abandoned by another is a violation of due process of law. We disagree.

Regardless of how the barrels got onto appellant's property, appellant was aware of the barrels and, despite numerous instructions to do so, failed to have them tested and continued to store them on his property in violation of Ohio law. Appellant was instructed numerous times, beginning in 1994, to have the barrels tested and properly disposed. It is also well established that he knew of the barrels' existence for over three years before the director ordered him to have them tested. Appellant was allowed an appeal of the director's order to the Environmental Board of Review, but failed to avail himself of this process.

Accordingly, we find that appellant was not convicted for the acts of another, he was convicted for his own reckless disobedience. We further find that appellant was not denied due process of law. Appellant's fourth assignment of error is therefore found not well-taken.

In his fifth assignment of error, appellant argues that the trial court failed to recognize in its instructions to the jury the difference between environmental waste which had been "abandoned" on the defendant's property as opposed to "stored" on his property. Appellant argues that the difference between abandoning waste and storing waste relates to the mental state of the actor who must intentionally store property. Because there was no evidence showing that appellant had any intent to use those substances in the barrels, he did not store them. Rather, they were abandoned by another and, therefore, appellant should

not be convicted for failing to remove a hazard created by a third party.

R.C. 3734.01(M) defines "storage":

> "'Storage,' when used in connection with hazardous waste, means the holding of hazardous waste for a temporary period in such a manner that it remains retrievable and substantially unchanged physically and chemically and, at the end of the period, is treated; disposed of; stored elsewhere; or reused, recycled, or reclaimed in a beneficial manner. ***"

"Waste" is any discarded material that is not excluded by the O.A.C. O.A.C. 3745-51-02(A)(1). "Discarded material" is any material which is:

> "(a) Abandoned, as put forth in paragraph (B) of this rule; or
>
> "(b) Recycled, as put forth in paragraph (C) of this rule; or
>
> "(c) Considered inherently waste-like as put forth in paragraph (D) of this rule."

O.A.C. 3745-51-02(A)(2). O.A.C. 3745-51-02(B) states when waste is abandoned:

> "(B) Materials are waste if they are abandoned by being:
>
> "(1) Disposed of; or
> "(2) Burned or incinerated; or

> "(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated."

"'Disposal' means the discharge, deposit, injection, dumping, spilling, leaking, emitting, or placing of any solid wastes or hazardous waste into or on any land or ground or surface water or into the air ***." R.C. 3734.01(F).

Based on the definitions above, waste can be considered abandoned when it is stored. See O.A.C. 3745-51-02(B)(3). Hence, abandoned waste can also be stored waste. Even if the hazardous waste in this case was abandoned, it was not incinerated and it was not disposed of; therefore, it must have been stored. See O.A.C. 3745-51-02(B).

Although appellant did not cause the barrels to be on his property, once discovered, he did hold the hazardous waste on his property. Based on the definition of "storage," although hazardous waste that is being held for reuse is considered "stored" the waste must be kept for reuse. See R.C. 3734.01(M).

As stated above, "storage" means that hazardous waste is temporarily being held "in such a manner that it remains retrievable and substantially unchanged physically and chemically" and eventually is treated, disposed of, or stored elsewhere. See Id. That is precisely what occurred to this hazardous waste. Accordingly, appellant's fifth assignment of error is found not well-taken.

On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of

Common Pleas is affirmed. Court costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App. R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. /s/ Peter M. Handwork
JUDGE

James R. Sherck, J. /s/ James R. Sherck
JUDGE

Richard W. Knepper, Jr.
CONCUR. /s/ Richard W. Knepper
JUDGE

Case No. 99-477

THE SUPRME COURT OF OHIO

State of Ohio, Appellee v. Sheldon Schachner, Appellant.

1999 TERM

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal.

COSTS:

Docket Fee, $40.00, paid by Kerger & Kerger.

(Lucas County Court of Appeals; No. L971388)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such States, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other

crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim of the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.